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NZ Galaxy Sdn Bhd v Sinergi Ikram (M) Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1066–06 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
28 APRIL 2016

C

Civil Procedure — Appeal — Facts, finding of — Whether there was factual or legal basis to find in favour of respondent — Whether appellate intervention warranted

D

Contract — Breach — Action for damages — Whether trial judge erred in finding appellant to be in breach — Whether respondent's government contracts terminated as result of breach — Whether appellant fulfilled terms of its contract with respondent — Whether respondent by its own conduct sought termination of E *government contracts*

On 4 April 2011, the respondent had entered into four sets of contract with the Government of Malaysia ('the government contracts'). Under the terms of the government contracts the respondent agreed to supply and deliver 22 units of F ambulances for the use of the Ministry of Health. The respondent then entered into another set of contracts with the appellant for the supply of the said ambulances. The respondent alleged that the appellant was in breach of the contract to supply ambulances. According to the respondent, the government contracts were for the supply of ambulances with SDK chassis but the appellant G had supplied 22 ambulances with CBU chassis. Resulting from the appellant's breach, the respondent claimed that the government contracts were terminated. Thus, the respondent filed a claim against the appellant for damages for the termination of the government contracts. The trial judge found that the significant difference between the SDK and CBU chassis was H the fact that the CBU chassis would attract customs duties and taxes whereas the SDK chassis would not. Thus based on that fact the trial judge found that the contract between the appellant and the respondent was for the supply of 22 ambulances with SDK chassis and that the appellant was in breach by supplying the ambulances with CBU chassis. As such, the High Court allowed I the respondent's claim for loss and damages against the appellant. This was the appellant's appeal against that decision. It was the appellant's submission that the trial judge had erred in finding that the CBU chassis was free of customs duties and taxes. It was the appellant's contention that both the CBU chassis and SDK chassis were subjected to taxes and import duties. The appellant

submitted that from the express clause in the government contracts, namely cl 2.2, it was obvious that there was provision made for customs duties and taxes but the trial judge had erred to have inferred so. Aside from the express clause, the appellant also relied on evidence in the form of letters written by the respondent applying for exemption from payment of taxes and duties.

Held, allowing the appeal with costs:

(1) There was ample evidence in the form of documents before the trial judge that there were taxes and duties payable on the 22 units purchased by the respondent from the appellant. The fact of delivery and acceptance supported the case of the appellant that the appellant had fulfilled the terms of its contract with the respondent. There was therefore no breach by the appellant on the terms of its contract with the respondent, as was founded by the trial judge. On the evidence before the High Court, the respondent had clearly failed to prove its case against the appellant. In the circumstances this was a case warranting appellate intervention (paras 12–15 & 29).

(2) Based on the testimonies of the representatives of the Government of Malaysia, it was clear that it did not matter to the government whether the ambulances had a SDK chassis or CBU chassis. In any case, the finding by the trial judge that there was a difference between SDK and CBU in terms of the government taxes and duties payable was incorrect and not borne out by the evidence. There was a considerable volume of evidence, both documentary as well as oral, that was consistent with the appellant's case before the High Court, which was that the government taxes and duties were payable, whether the ambulances had a SDK chassis or CBU chassis. This fact was also known to the respondent as evidenced by its letter applying for tax exemption. The respondent's conduct could only lead to one conclusion, which was that the 22 units were very much subjected to payment of the government taxes and duties and this applied whether the ambulances had a SDK chassis or CBU chassis (see paras 20–25).

(3) On the evidence it was abundantly clear that the respondent had by its own conduct sought the termination of the government contracts. The respondent was precluded or estopped from denying this fact. This being the factual position the respondent could not in law or on the facts claim to any entitlement in the form of damages or otherwise. The trial judge did not have a factual or legal basis to find in favour of the respondent (see paras 27–31).

[Bahasa Malaysia summary

Pada 4 April 2011, responden telah memasuki empat set kontrak dengan Kerajaan Malaysia ('kontrak kerajaan'). Di bawah syarat-syarat kontrak

kerajaan responden bersetuju untuk membekalkan dan menyerahkan 22 unit ambulans untuk kegunaan Kementerian Kesihatan. Responden kemudiannya memasuki satu lagi kontrak dengan perayu untuk membekalkan ambulans-ambulans tersebut. Responden mendakwa perayu telah melanggar kontrak untuk membekalkan ambulans. Menurut responden, kontrak kerajaan adalah untuk membekalkan ambulans dengan casis SDK tetapi perayu telah membekalkan 22 buah ambulans dengan casis CBU. Akibat daripada pelanggaran perayu, responden mendakwa bahawa kontrak kerajaan tersebut ditamatkan. Oleh itu, responden memfailkan tuntutan terhadap perayu untuk ganti rugi untuk penamatan kontrak kerajaan. Hakim perbicaraan mendapati bahawa perbezaan yang ketara antara casis SDK dan CBU adalah fakta bahwa casis CBU akan menarik duti kastam dan cukai manakala casis SDK tidak. Oleh itu berdasarkan fakta tersebut hakim perbicaraan mendapati bahawa kontrak di antara perayu dan responden adalah untuk membekalkan 22 buah ambulans dengan casis SDK dan bahawa perayu telah melanggar dengan membekalkan ambulans dengan casis CBU. Oleh itu, Mahkamah Tinggi membenarkan tuntutan responden untuk kerugian dan ganti rugi terhadap perayu. Ini adalah rayuan perayu terhadap keputusan tersebut. Hujahan perayu adalah bahawa hakim perbicaraan terkhilaf dalam dapatannya bahawa casis CBU bebas daripada duti kastam dan cukai. Perayu berhujah bahawa kedua-dua casis CBU dan SDK tertakluk kepada cukai dan duti import. Perayu berhujah bahawa terdapat peruntukan yang jelas dalam kontrak kerajaan, iaitu klausa 2.2, adalah jelas bahawa peruntukan dibuat untuk duti dan cukai kastam tetapi hakim perbicaraan terkhilaf dalam mengandaikan sedemikian. Selain daripada klausa yang tersurat, perayu juga bergantung kepada keterangan dalam bentuk surat yang ditulis oleh responden yang memohon pengecualian daripada pembayaran cukai dan duti.

Diputuskan, membenarkan rayuan dengan kos:

(1) Terdapat keterangan yang mencukupi dalam bentuk dokumen di hadapan hakim perbicaraan bahawa terdapat cukai dan duti yang perlu dibayar ke atas 22 buah unit yang dibeli oleh responden daripada perayu. Fakta penghantaran dan penerimaan menyokong kes perayu bahawa perayu telah memenuhi syarat-syarat kontrak dengan responden. Oleh itu, tiada pelanggaran oleh perayu ke atas syarat-syarat kontrak dengan responden, sebagaimana yang telah diasaskan oleh hakim perbicaraan. Berdasarkan keterangan di hadapan Mahkamah Tinggi, responden jelas gagal membuktikan kesnya terhadap perayu. Dalam keadaan ini adalah satu kes mewajarkan campur tangan rayuan (lihat perenggan 12–15 & 29).

(2) Berdasarkan keterangan daripada wakil-wakil Kerajaan Malaysia, adalah jelas bahawa tidak penting kepada kerajaan sama ada ambulans tersebut mempunyai casis SDK atau casis CBU. Dalam mana-mana kes, dapatan oleh hakim perbicaraan bahawa terdapat perbezaan antara SDK dan

CBU dari segi cukai kerajaan dan duti yang perlu dibayar adalah tidak betul dan tidak ditanggung oleh keterangan. Terdapat jumlah keterangan yang agak besar, dokumentari berserta lisan, yang konsisten dengan kes perayu di Mahkamah Tinggi, bahawa cukai dan duti kerajaan itu perlu dibayar, sama ada ambulans tersebut mempunyai casis SDK atau casis CBU. Fakta ini juga dikenali kepada responden seperti yang dibuktikan oleh suratnya memohon pengecualian cukai. Tindakan responden hanya boleh membawa kepada satu kesimpulan iaitu bahawa 22 unit tertakluk kepada pembayaran cukai dan duti kerajaan dan ini terpakai sama ada ambulans mempunyai casis SDK atau casis CBU (lihat perenggan 20–25).

(3) Berdasarkan keterangan adalah jelas bahawa responden melalui tindakannya menuntut penamatan kontrak kerajaan. Responden dihalang atau diestop daripada menafikan fakta ini. Ini merupakan kedudukan fakta yang responden tidak boleh dari segi undang-undang atau berdasarkan fakta-fakta menuntut kepada mana-mana hak dalam bentuk ganti rugi atau sebaliknya. Hakim perbicaraan tidak mempunyai asas undang-undang atau fakta untuk membuat dapatan memihak kepada responden (lihat perenggan 27–31).]

Notes

For cases on finding of facts, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1166–1308.

For cases on action for damages, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3444–3451.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman [2009] 1 MLJ 580, CA (refd)

Appeal from: Suit No 22NCVC-293–03 of 2012 (High Court, Kuala Lumpur)

N Chandran (V Vijakumar and Sabrina Leong with him) (Albar & Partners) for the appellant.

Mohd Yaacob bin Bakanali (Mohd Hilmi bin Hj Sarbini with him) (Hussein & Co) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] The respondent through four sets of contract with the Government of Malaysia covenanted to supply, deliver, test run and the commission a total of

22 units of ambulances for the use of the Ministry of Health. The four sets of contract between the Government of Malaysia and the respondent ('the government contracts') are evidenced by the following contract documents:

(a) contract dated 4 April 2011 for the supply of two units;

(b) contract dated 4 April 2011 for the supply of four units;

(c) contract dated 4 April 2011 for the supply of nine units; and

(d) contract dated 4 April 2011 for the supply of seven units

[2] Consequent to that the respondent entered into an agreement with the appellant, Sinergi Ikram (M) Sdn Bhd for the supply of the said ambulances. The agreement between them culminated from the following documents:

(a) the letter of quotation of price dated 3 January 2011, for 22 units of ambulances from the appellant to the respondent;

(b) the purchase order from the respondent to the appellant for 22 units of the ambulances dated 4 January 2011;

(c) confirmation on the purchase of Peugeot Boxer chassis from the appellant to the respondent dated 7 March 2011;

(d) confirmation on the purchase of Peugeot Boxer chassis from the appellant to the respondent dated 7 March 2011; and

(e) confirmation on the purchase of Peugeot Boxer chassis from the respondent to the appellant in respect of the 22 units ambulances dated 8 March 2011.

[3] The second set of contracts between the appellant and the respondent constitute the subject of the respondent's claim against the appellant in this case. The respondent contended that the government contracts were for the supply of ambulance with SDK chassis hence it follows that the appellant's supply to the respondent ought to be on SDK basis too. The main dispute between them therefore centred on the issue of whether the supply of the ambulances by the appellant were agreed to be on SKD or CBU chassis. It was not disputed that the appellant had supplied 22 ambulances with CBU chassis, awaiting tax clearance at Kontena National.

[4] The learned High Court judge found that the contract between the appellant and the respondent was for the supply of the 22 ambulances with SDK chassis and the appellant was therefore in breach for supplying the ambulances with CBU chassis. Resulting from the breach by the appellant the respondent said the government contracts were terminated. The claim for loss and damages against the appellant was allowed by the learned judge.

[5] Before we get into the dispute it would be instructive to appreciate the difference between the two types of chassis as found by the learned judge. In this regard the learned High Court judge in her grounds of judgment observed as follows:

> 19. The significance of the difference between SKD and CBU Chassis lies in the fact that the CBU Chassis attract customs duties and taxes unlike SKD Chassis which do not. The tax implication in this case is in the sum of RM2,359,891.25.
>
> 20. After having heard the witnesses after full trial, and having examined all the evidence adduced, I am of the view that the agreement struck between the parties was for the supply and delivery of SKD Chassis and not CBU. My reasons are as follows.

[6] The learned judge accepted the evidence of PW1, the representative from the Ministry of Health who executed the government contracts that the government contracts are for SDK chassis. This was based on what is stated in the *Lampiran* A annexed to the letters of award which states: 'NEGARA PEMBUAT: UNITED KINGDOM/MALAYSIA (SDK)'. As far as PW1 is concerned the government contracts are for SDK chassis simply because it is stated UNITED KINGDOM/MALAYSIA. According to him United Kingdom slash Malaysia denotes SDK as opposed to reference to only one specific country which would denote CBU.

[7] Learned counsel for the appellant contended that the finding of the learned trial judge as to the significance difference between SKD and CBU that the former is free of 'customs duties and taxes' unlike the latter is flawed on the facts of this case. This was because, under cl 2.2 in all of the government contracts it is provided as below:

> 2.2 Harga barang yang tercatit di JADUAL A kontrak ini adalah harga 'Free On Board' (FOB Named Port) ke Tapak Pengguna termasuk harga pembungkusan, pemasangan, pentauliahan dan latihan tetapi tidak termasuk segala Cukai Kerajaan.

[8] According to learned counsel this clause would negate the finding of the learned trial judge that the SKD chassis do not attract custom duties and taxes. It was submitted that the learned judge had erred to have inferred so. It was contended that there was therefore a very serious case of an erroneous finding of fact by the learned trial judge which depended upon inferences drawn from other facts, warranting an appellate interference.

[9] Aside from the express clause in the government contracts referred to above, there is the evidence in the form of letters written by the respondent itself, applying for exemption from payment of taxes and duties.

[10] We noted in particular para 5 of p 1242 of the letter, which clearly bears

out the fact that the respondent had fully acknowledged the fact that taxes and duties were payable on the 22 units purchased by it. Indeed in the same paragraph the respondent has also acknowledged that the 22 units of the chassis are to be in the form of CBU and not SKD.

[11] In the said letter, the reference made to its title heading is: 'Permohonan Pengecualian Cukai dan Duti Eksais bagi 22 unit casis Peugeot Boxer'. It was the appellant's submission that, that application by the respondent seeking tax and duty exemption had necessarily meant that the respondent was at all times aware of the fact that there would be tax and duties payable on the 22 units purchased from the appellant. Further to that there was also another document on point, which refers to: 'Permohonan Lanjutan Kontrak dan Pengecualian Cukai serta Duti Eksais bagi 22 unit casis Peugeot Boxer'.

[12] We further took note of the fact that at para 6 at p 1251, the respondent had expressly acknowledged the fact that the 22 units have been caused to be delivered to Kontena Nasional, in Petaling Jaya and that taxes and duties are payable thereon. Thus, on the documents before the learned trial judge, there was ample evidence that there were taxes and duties payable on the 22 units purchased by the respondent off the appellant.

[13] The fact of the delivery of the 22 units to the respondent on 15 August 2011 and 18 August 2011, was before the High Court as evidence. That too is evidenced by way of documents. The said delivery orders (at pp 3855–3857 of appeal record Vol 2(21) Part C) had been signed by the respondent. However, only subsequently the respondent denied acceptance of the 22 units when they failed to get the tax exemption, and thereby not able to take the same out of the bonded area at Kontena Malaysia unless taxes are paid.

[14] Thus the fact of delivery and acceptance supported the case of the appellant that the appellant had fulfilled the terms of its contract with the respondent. There is therefore no breach by the appellant on the terms of its contract with the respondent, as was found by the learned trial judge.

[15] In our view this is a case warranting appellate intervention on the reason that the learned trial judge had not considered this evidence which are in the form of documents before her in arriving at her decision (see *Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580 and *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517).

[16] The appellant's evidence at the High Court were these.

First, Jasmi bin Jaafar ('DW3'), the manager of the appellant testified at p 955 of the *RR* 2(5):

PC: Beza yang besar dua-dua kenderaan ini, ada satu ada cukai, satu tak ada cukai?

A: Kedua-duanya bercukai.

At p 956 he said:

PC: Bezanya?

A: Kedua-duanya bercukai.

Thus it was the appellant's evidence at the High Court that both CBU and SKD are subjected to taxes and import duties.

The next witness was Siti Fatimah bt Muhd Ali Hanifah ('PW2'), director of the respondent company testified:

DC: Seunit ya. Adakah harga tersebut termasuk cukai duti import dan duti akses kerajaan?

A: Tidak termasuk, sudah tulis, harga yang ditawarkan tidak termasuk duti dan import kerajaan.

Another witness, Mas Rizal bin Mohd Hilmi ('PW1'), Timbalan Setiausaha Bahagian Perolehan dan Penswastaan Kementerian Kesihatan Malaysia testified:

DC: Harga ditawarkan ini termasuk cukai atau tidak dalam borang rumusan harga tawaran ini?

A: Yang tercatat dalam dokumen Yang Arif harga tidak harga yang ditawarkan tidak termasuk cukai dan duti kerajaan Yang Arif.

DC: Ok, So dia dah tahu ya, harga yang ... Harga yang pada tarikh yang dimasuk ini ya tidak termasuk cukai dan duti kerajaan.

A: Ya.

[17] Further to this evidence, cl 20.1 of the government contracts reads:

> Jika dalam tempoh Kontrak ini, terjadi sebarang perubahan pada mana-mana duti kastam, cukai jualan, cukai tokok dan eksais: harta Kontrak akan, di atas permohonan oleh mana-mana pihak disesuaikan mengikut dan setakat perbelanjaan Kontraktor bertambah atau berkurangan.

When referred to cl 20.1 above, PW1 states as follows:

DC: Yang Arif ya. Tuan, tuan bersetuju tak klausa 20 ini membolehkan, membenarkan pihak plaintif meminta penambahan harga disebabkan oleh cukai?

A: If ... saya setuju Yang Arif.

[18] It is to be noted that in respect of six units of ambulances it expressly states 'Harga yang ditawarkan tidak termasuk cukai dan duti kerajaan'. This is found with the tender document leading to the government contracts which clearly bear out the fact that the price quotations therein are exclusive of taxes and government duties.

[19] These witnesses' telling evidence on SDK and CBU is important to be noted and this is what the evidence at pp 154, 186 and 187 show:

DC: Sebenarnya kalau mengikut perjanjian ini, dia boleh minta kerajaan bayar, setuju atau tidak, kalau mengikut agreement ini. Tapi dia kena buat permohonan lah.

A: Kalau buat permohonan saya setuju Yang Arif, tapi bergantung kepada pesetujuan Kementerian Kewangan Yang Arif.

DC: Dari pengalaman kamu, kalau kenderaan itu sedang dikilang atau dikilang oleh Naza, adakah ia SKD atau CBU'.

A: Dengan izin Yang Arif, dia boleh jadi SKD ataupun CKD Yang Arif.

RR2(1) Bahagian B page 186 ACB 2 – 2C – TAB 21 page 462

PC: SKD atau CKD ya.

A: Ya, Yang Arif.

[20] What this evidence and that too of the representative of the Government of Malaysia simply means is it did matter to the Government of Malaysia whether it was SKD or CBU.

[21] The point is, in so far as taxes and import duties are concerned, it applies to both SKD or CBU. The finding by the learned judge that there is a difference between SKD and CBU in terms of the government taxes and duties payable, is incorrect and not borne out by the very evidence which were before her, both by way of documents as well as oral evidence.

[22] There is therefore a considerable volume of evidence both documentary as well as oral, which was consistent with the appellant's case before the High Court and which is that the government taxes and duties are payable, whether it be SKD or CBU, a fact known to the respondent as well as to the representatives of the Ministry of Health.

[23] The respondent had in fact applied for tax exemption. This was in evidence before the trial judge. There was a letter from the respondent addressed to the honourable Minister of Finance II, seeking tax exemption. It is significant to note the reference to that letter reads:

> Permohonan Pengecualian Cukai dan Duti Eksais bagi 22 unit casis Peugeot Boxer.

[24] If it is true that the price for the 22 units is inclusive of government taxes and duties, what then was the need for the respondent to have applied for exemption of such taxes and duties.

[25] In our view the respondent's conduct clearly can lead to only one conclusion, which is that the 22 units were very much subjected to payment of the government taxes and duties and this applies whether it is SKD or CBU.

[26] At the trial the suggestion of the respondent and thereby the understanding of the learned trial judge was that, the termination of the respondent and Government of Malaysia contract, was for the reason of the alleged default of the appellant on the appellant's contract with the respondent.

[27] The notice of termination is found in *RR* 2(7) *Bahagian* C pp 1270–1285. The evidence of Mas Rizal bin Mohd Hilmi, Timbalan Setiausaha, Bahagian Perolehan dan Penswastaan, Kementerian Kesihatan Malaysia (PW1) was that the termination of the government contracts was sometime towards the end of 2011. This was following a meeting between the Ministry of Health and the respondent. He further testified that the decision to terminate the contract between the Ministry of Health and the respondent was accepted by the respondent.

[28] It is also in evidence through PW1 that the date of the termination of the contract between the respondent and the Ministry of Health was 30 December 2011. The evidence of Abu Bakar bin Arshad, the general manager of the respondent (PW3) was as follow:

DC:	Encik Bakar, dalam kes ini kontrak ini ditamatkan oleh secara notice oleh pihak KKM pihak kerajaan betul?
A:	Betul.
DC:	Sebenarnya Encik Bakar setuju tak, sebenarnya pihak Plaintif telah memohon untuk kontrak di antara Plaintif dengan KKM ditamatkan. Sebenarnya pihak Plaintif yang memohon.
A:	Setuju.

[29] The respondent's claim against the appellant was simply that the appellant had breached the second set of contracts. On the evidence which

were before the High Court, the respondent had clearly failed to prove its case against the appellant. The undisputed evidence before the learned trial judge was that the 22 units of the Peugeot Boxer were in fact caused to be delivered to the respondent. In para 6 at p 1251 of that letter of the respondent to the honourable Deputy Minister, the respondent has clearly acknowledged the fact that the 22 units of chassis were at Kontena Nasional Petaling Jaya, awaiting tax and duty clearance.

[30] What is also abundantly clear is the fact that the termination was as a consequence of the respondent itself requesting for such termination. This being the factual position, the respondent cannot in law or on the facts claim to any entitlement in the form of damages or otherwise which the respondent had brought about by its own conduct, in seeking the termination of its contract with the Government of Malaysia.

[31] The decision of the High Court in awarding damages to be assessed, in our view was therefore without factual or legal basis and not supported by the evidence which was before Her Ladyship. The evidence in relation to the circumstances leading to the termination of the respondent relating to the government contracts which point clearly to the respondent's own conduct in seeking the termination, must also necessarily preclude or estop the respondent from denying that fact.

[32] For the above reasons, in our view the learned trial judge had failed to take into account the relevant facts in arriving at her decision. We therefore allowed the appeal with costs and we set aside the order of the High Court.

Appeal allowed with costs.

Reported by Kohila Nesan